

No. 15,718

United States Court of Appeals
For the Ninth Circuit

PHILLIP DANIELS,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

Appeal from the District Court for the
Territory of Alaska, Third Division.

BRIEF FOR APPELLEE.

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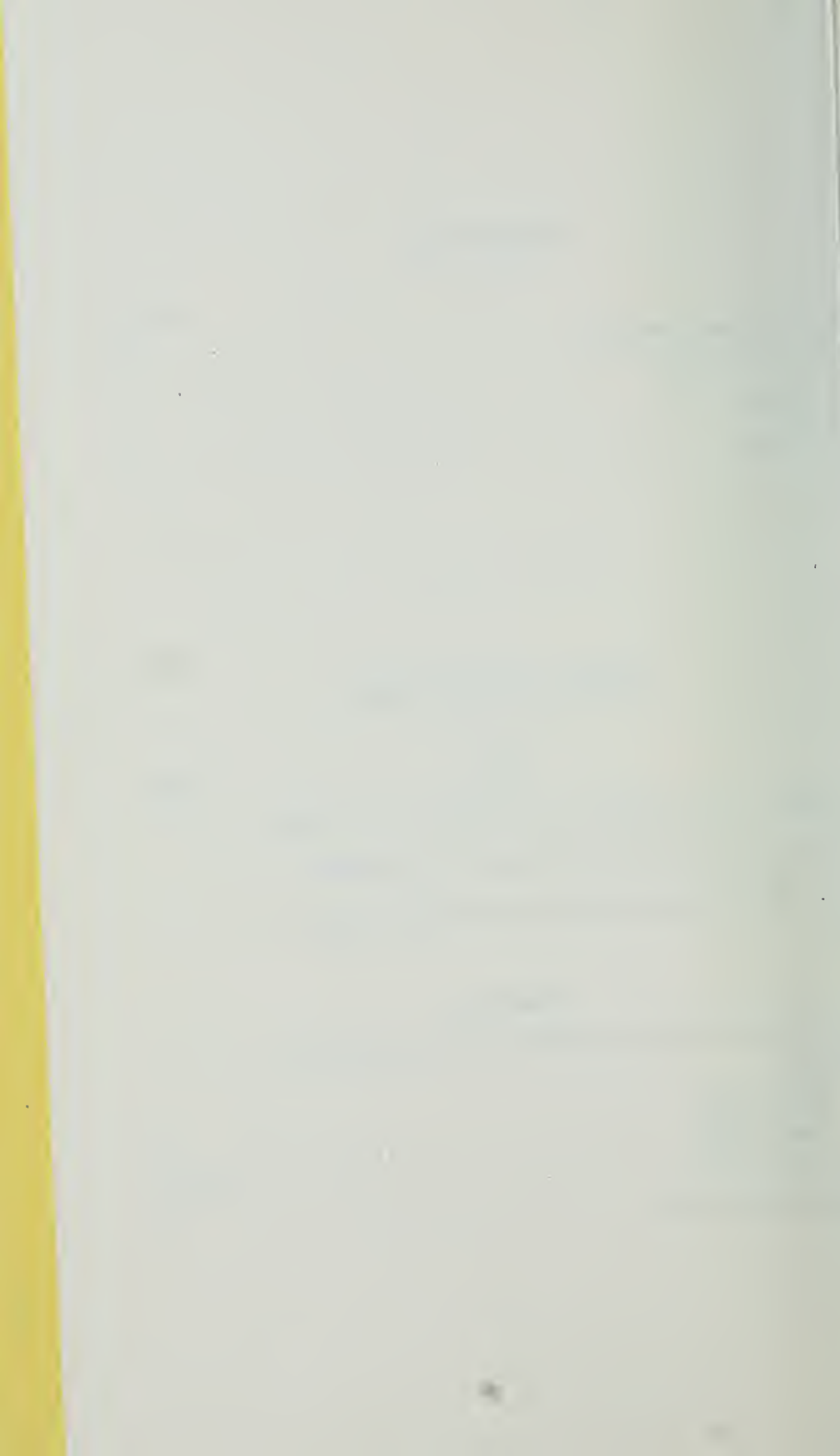
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JURISDICTIONAL STATEMENT.

On December 1, 1952, Appellant was convicted upon his plea of guilty in the District Court for the District of Alaska, Third Judicial Division at Anchorage, Alaska, the Honorable Anthony J. Dimond presiding, of a violation of Section 65-4-1, Alaska Compiled Laws Annotated, 1949.

Upon such plea of guilty and conviction the Appellant was sentenced to imprisonment for life.

Almost four years subsequently, Appellant filed in the said District Court a "Motion to Vacate and Set Aside Illegal Judgment and Sentence". Appellant expressly made this motion under and by virtue of the authority of Section 2255 of Title 28, U.S.C.

This Motion was filed in the District Court on September 29, 1956.

Appellant's said motion was denied by the District Court and from such denial the Appellant prosecuted an appeal. The Court of Appeals affirmed the trial court's order. Case 15,410.

Appellant on July 5, 1957, filed a second motion in said District Court to vacate and set aside judgment and sentence. Said motion was based on 28 U.S.C. 2255. On July 26, 1957, the Court denied the Appellant's motion.

Appellant prosecutes the present appeal from the July 26, 1957 order of the District Court.

Jurisdiction below was conferred by 48 U.S.C. 101. Jurisdiction in this Court is conferred by 28 U.S.C. 1291, 2253 and 2255.

STATEMENT OF FACTS.

On October 22, 1952, Appellant was indicted in the District Court, Third Judicial Division, Alaska, for murder in the first degree. Appellant was arraigned on November 20, 1952, and pleaded guilty on December 1, 1952. Thereupon, the District Court sentenced the Appellant to be imprisoned for life. Appellant filed on September 29, 1956, a motion to vacate and set aside judgment. Said motion was based on 28 U.S.C. 2255. On November 23, 1956, the District Court denied the motion. Thereupon, Appellant filed an

appeal in the U. S. Court of Appeals for the Ninth Circuit. On May 28, 1957, the Court of Appeals affirmed the order of the District Court denying Appellant's motion. Case No. 15,410, U. S. Court of Appeals for the Ninth Circuit.

On July 5, 1957, Appellant filed in the District Court a motion to vacate and set aside judgment and sentence. The motion was based on 28 U.S.C. 2255. On July 26, 1957, said motion was denied. Appellant prosecutes this appeal from the final order of the District Court.

Appellant relies on four grounds to sustain his claim that the District Court had no jurisdiction over the matter.

ARGUMENT.

The grounds relied upon by Appellant are identical to those relied upon in his first motion in the District Court filed September 29, 1956. They do not differ in any respect. The District Court's denial of the motion was upheld by the Court of Appeals Case No. 15,410 on May 28, 1957. The difference between the present appeal and the prior one on September 29, 1956 lies mainly in that petitioner abandons his prayer for mitigation of punishment by the Court of Appeals.

It is clearly stated in the very statute relied upon by the Appellant, i.e., 28 U.S.C. 2255, that the trial court is not required to entertain a second motion to vacate a sentence. The pertinent part of the statute reads as follows:

“The sentencing court shall not be required to entertain a second or successive motion for similar relief on behalf of the same prisoner.”

Further, a number of cases support and amplify the above statute. The courts have held that it is within the trial court's discretion to refuse to entertain a second or similar motion to vacate. Only an abuse of that discretion would warrant a reversal of the District Court order.

In *Dunn, Appellant v. United States, Appellee* (6 C.C.A.), 234 F. 2d 219, 1956, the Court of Appeals held that it was within sound discretion of trial court to refuse to consider a motion based on 28 U.S.C. 2255, which motion was similar to prior motions filed by the Appellant and refused by the trial court.

In *Moss v. United States* (10 C.C.A.), 177 F. 2d 438, 1949, the Court heard an appeal from a denial of Appellant's motion to vacate judgment and sentence. The defendant appellant had filed a motion to vacate and set aside sentence. He had previously filed a proceeding in habeas corpus. Evidence was taken by the trial court upon that proceeding and the writ was refused. The Court of Appeals held that it was within the solemn discretion of the trial court whether or not to entertain the second motion. The refusal of the trial court to so do was not an abuse of discretion. The Court of Appeals upheld the trial court.

In *Bickford v. United States* (9 C.C.A.), 206 F. 2d 395, 1953, the Court held that a third motion based on 28 U.S.C. 2255 need not be entertained. The Court

did not elaborate, but relied on the clear and concise language of the statute itself.

CONCLUSION.

The grounds on which Appellant's motion is based are identical to those in his first motion. The first motion was similar to the present one. The trial court denied the motion and the Court of Appeals upheld the District Court. The statute states clearly that the sentencing court shall not be required to entertain a second motion for similar relief. Courts have held repeatedly that it is a matter of discretion. The trial court did not abuse its discretion in this matter. Appellant's motion should be denied.

Dated, Anchorage, Alaska,
May 16, 1958.

Respectfully submitted,
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